RECORD AND BRIEFS

Nos. 15-1503 & 15-1504

FILED
FEB 3 - 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, & TIMOTHY CATLETT, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

RUSSELL L. OVERTON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF AMICUS CURIAE CENTER ON WRONGFUL CONVICTIONS OF YOUTH IN SUPPORT OF PETITIONERS

Laura H. Nirider
Counsel of Record
Steven A. Drizin
Megan G. Crane
CENTER ON WRONGFUL CONVICTIONS OF YOUTH
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-8576
l-nirider@law.northwestern.edu

Robert B. Humphreys
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1999 Avenue of the Stars
Suite 600
Los Angeles, CA 90067
(310) 229.1000
rhumphreys@akingump.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Petitioners' convictions must be set aside under *Brady v. Maryland*, 373 U.S. 83 (1963).

TABLE OF CONTENTS

Page

INTERESTS OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. FALSE CONFESSIONS, PARTICULARLY BY MINORS, ARE A SIGNIFICANT CAUSE OF WRONGFUL CONVICTIONS 4

II. RISK FACTORS ASSOCIATED WITH FALSE CONFESSIONS ARE PRESENT IN THIS CASE 14

A. The Confessors Were All Teenagers. 14

B. There Is Evidence that Threats of Harm and Other Coercive Tactics were Used During These Interrogations 17

C. The Confessions Were Inconsistent with the Crime Scene Evidence 19

D. The Confessions Were Contaminated 22

E. The Confessions Were Too Unreliable and the Prosecution Case Too Weak to Excuse Compliance with Brady 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) 5, 16

Bellotti v. Baird,
443 U.S. 622 (1979) 14

Brown v. Mississippi,
297 U.S. 278 (1936) 18

Corley v. United States,
556 U.S. 303 (2009) 3, 5

Dickerson v. United States,
530 U.S. 428 (2000) 4

Eddings v. Oklahoma,
455 U.S. 104 (1982) 14

Escobedo v. Illinois,
378 U.S. 478 (1964) 4

Haley v. Ohio,
332 U.S. 596 (1948) 14

J.D.B. v. North Carolina,
564 U.S. 261 (2011) ..... *passim*

Miranda v. Arizona,
384 U.S. 436 (1966) 7, 16, 21

Roper v. Simmons
543 U.S. 551 (2005) 14

United States v. Agurs,
427 U.S. 97 (1976) 24

Other Authorities

Brandon L. Garrett, *Contaminated Confessions Revisited*, 2015 VA. L. REV. 395 (2015) 3, 9, 15, 22

Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010) 6, 20

Elizabeth R. Sowell et al., *In Vivo Evidence For Post-Adolescent Brain Maturation In Frontal And Striatal Regions*, 2 NATURE NEUROSCIENCE 10 (1999) 16

Fred Inbau, John Reid, et al., *Criminal Interrogation and Confessions* (5th ed. 2013) 7, 9

Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L. J. ANN. REV. CRIM. PROC. (2015) 5, 12, 13

IACP, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation IACP, Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation,* at http://www.iacp.org/Portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf (last visited Jan. 30, 2017) 7, 8, 15

Innocence Project, *Background on Dixmoor and Englewood Cases, at* http://www.innocenceproject.org/background-on-dixmoor-and-englewood-cases/ (last visited Jan. 30, 2017) 9, 10, 13

Innocence Project, *DNA Exonerations in the United States,* at http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jan. 30, 2017) 6

Jessica R. Meyer & N. Dickon Reppucci, *Police Practices & Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility,* 25 BEHAV. SCI. & L. 757 (2007) 7

Mid-Atlantic Innocence Project, *The Norfolk Four, at* https://exonerate.org/all-project-list/norfolk-four-derek-tice-danial-williams-joseph-dick-and-eric-wilson/ (last visited Jan. 30, 2017) 9

Nat'l Reg. of Exonerations, *For 50 Years, You've Had the Right to Remain Silent, You've Had the Right to Remain Silent,* at http://www.law.umich.edu/special/exoneration/Pages/false-confessions-.aspx (last visited Jan. 30, 2017) 6

Nat'l Reg. of Exonerations, *% Exonerations by Contributing Factor*, at http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited Jan. 30, 2017). 6, 7

Nat'l Reg. of Exonerations, *Guilty Pleas and False Confessions*, at http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article4.pdf (last visited Jan. 30, 2017) 10

Richard Leo, Steven A. Drizin, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty First Century*, 2006 WISC. L. REV. 479 (2006) 8, 13

Richard Oshe & Richard Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) 15

Samuel R. Gross, et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005) 15

Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations* 34 LAW & HUM. BEH. 3-38 (2010) 14, 16, 18, 19

Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOL. 431 (2012) 12

Steven A. Drizin & Richard Leo, *The Problem of False-Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) 1, 5, 6, 8, 16

INTERESTS OF AMICUS *CURIAE*[1]

The Center on Wrongful Convictions of Youth ("the Center") is the only organization in the country dedicated to exonerating wrongfully convicted children and to studying and pursuing evidence-based reforms that will prevent future miscarriages of justice for youth. Operating under the auspices of the Bluhm Legal Clinic at Northwestern University School of Law, the Center is a joint project of the Clinic's Center on Wrongful Convictions and the Children and Family Justice Center. Founded in 2009 by Steven A. Drizin, one of the nation's leading experts on interrogations and confessions, the Center has become nationally prominent as a result of its work in high-profile juvenile confession cases like that of Brendan Dassey, whose case was featured in the Netflix Global series Making a Murderer, and that of the West Memphis Three, whose cases have been featured in Oscar-winning documentaries like HBO's Paradise Lost and West of Memphis.

In addition to its casework, the Center regularly submits amicus briefs across the country in cases involving juvenile confessions, including a brief cited by this Court in *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011), for the proposition that "the risk [of false confessions] is all the more troubling—and, recent studies suggest, all the more acute—when the

---

[1] All parties have consented to the filing of this Brief. No counsel for a party authored this brief in whole or in part, and no person, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

subject of custodial interrogation is a juvenile." The Center's staff also regularly collaborates with law enforcement organizations, like the International Association of Chiefs of Police and leading interrogation training firm Wicklander Zulawski and Associates, to develop best practices for interrogating juvenile suspects that mitigate the risk of false confession.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case is whether the prosecution improperly withheld evidence that Catherine Fuller was not killed by Petitioners, but instead by one or two people, who were seen at the scene of the crime, including one who had a history of assaulting women and was behaving suspiciously. This evidence would have attacked the entire theory of prosecution and provided a basis to show that each and every Petitioner was innocent.

But the jury was not allowed to hear this evidence. The court of appeals held that no one would have believed that the attack was the work of one or two people, in significant part, because the government had obtained confessions from three young men who "admitted" that they and the Petitioners participated in a group attack. Pet. App. 51a-52a.[2] The D.C. Court of Appeals expressed its faith in confessions in very strong language, holding that it would require "suspending one's disbelief" to accept the "preposterous" notion that persons would

---

[2] All "Pet. App." citations herein refer to the Appendix to the Petition in No. 15-1503.

confess to a crime that they did not commit. Pet. App. 57a-58a. Accordingly, "the burden on appellants to show materiality [was] quite difficult" where the exculpatory evidence ran directly counter to the statements of government witnesses, including, particularly, the confessors. Pet. App. 54a.

The assumption that only guilty people confess to crimes finds no support in this Court's precedents or in the studies that have been undertaken into the causes of wrongful convictions. As this Court has recognized, the pressures of police interrogation "can induce a frighteningly high percentage of people to confess to crimes that they never committed." *Corley v. United States*, 556 U.S. 303, 320-21 (2009). That risk is heightened when the suspect is a juvenile. *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011)

The existence of false confessions has been proven scientifically by DNA evidence. False confessions are a leading cause of wrongful convictions of adults and children. Brandon L. Garrett, *Contaminated Confessions Revisited,* 2015 Va. L. Rev. 395, 395-7 (2015). Indeed, recent DNA exonerations are dominated by false confessions. *Id.* at 396.

In the wake of DNA exonerations, confessions cannot be regarded as sacred cows. The confessions in this case were: particularly subject to challenge as they were: obtained from vulnerable young people, through coercive interrogation tactics, inconsistent with the crime scene evidence and the other confessions, and contaminated with facts provided by the police and the media.

Because confessions are subject to challenge,

the accused is entitled to whatever exculpatory evidence the government has so they can mount the most effective challenge. Indeed, given the persuasive power of confession evidence to juries, the failure to disclose such evidence may increase the risk of wrongful conviction, making the *Brady* obligation even more imperative—not less—in confession cases.

ARGUMENT

I. FALSE CONFESSIONS, PARTICULARLY BY MINORS, ARE A SIGNIFICANT CAUSE OF WRONGFUL CONVICTIONS

1. This Court has long warned of the dangers of a criminal justice system dependent on obtaining confessions:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement, which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) (footnotes omitted); *Dickerson v. United States,* 530 U.S. 428, 435 (2000) ("Beddingsecause custodial interrogation, by its very nature, isolates and pressures the individual, we [have] stated that even without employing brutality, the 'third degree,' or

other specific stratagems, ... custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals.").

The Court has recognized that the pressures of custodial interrogation "can induce a frighteningly high percentage of people to confess to crimes that they never committed." *Corley v. United States,* 556 U.S. at 320-21 (citing Steven A. Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. Rev. 891, 906-07 (2004)); *See also Atkins v. Virginia,* 536 U.S. 304, 320 n. 25 (2002) (noting example of intellectually disabled death row inmate, exonerated by DNA evidence, who falsely confessed to a crime that he did not commit).

Judge Kozinski of the Ninth Circuit stated in a recent article:

> Innocent people do confess and with surprising regularity. Harsh interrogation tactics, a variant of Stockholm syndrome, the desire to end the ordeal, emotional and financial exhaustion, family considerations and the youth or feeble-mindedness of the suspect can result in remarkably detailed confessions that are later shown to be utterly false.

Hon. Alex Kozinski, *Criminal Law 2.0,* 44 Geo. L. J. Ann. Rev. Crim. Proc. at vii (2015).

2. False confessions are now a well-recognized fact. DNA evidence has proved, beyond the shadow of a doubt, that innocent people do indeed

confess – often in great detail, and usually as a result of pressure-filled interrogation tactics – to crimes that they did not commit. *See* Brandon L. Garrett, *The Substance of False Confessions,* 62 STAN. L. REV. 1051, 1066-1090, 1118-19 (2010); Nat'l Reg. of Exonerations, *For 50 Years, You've Had the Right to Remain Silent,* at http://www.law.umich.edu/special/exoneration/Pages/false-confessions-.aspx (last visited Jan. 30, 2017); Steven A. Drizin & Richard Leo, *The Problem of False-Confessions in the Post-DNA World,* 82 N.C. L. REV. 891, 905-06 (2004).

Of the 349 people who have been exonerated based on DNA evidence, 28% of them had falsely confessed to the crime. *See* Innocence Project, *DNA Exonerations in the United States,* at http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Jan. 30, 2017). Of the 1,975 proven exonerations in the National Registry of Exonerations (which include exonerations based on evidence besides DNA), 12% of them involved false confessions. *See* Nat'l Reg. of Exonerations, *% Exonerations by Contributing Factor,* at *http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx* (last visited Jan. 30, 2017).

This is true even in the most serious cases. In a 2004 study of 125 proven false confessions, 81% of those confessions occurred in murder cases. *See* Steven A. Drizin & Richard Leo, *The Problem of False-Confessions in the Post-DNA World,* 82 N.C. L. REV. 891, 946-47 (2004). Indeed, the rate of false confessions is significantly higher in murder cases (22%) than cases involving other crimes (4-8%). *See*

Nat'l Reg. of Exonerations, *% Exonerations by Contributing Factor,* at *http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx* (last visited Jan. 30, 2017).

Leading law enforcement organizations and interrogation trainers also recognize that false confessions can occur as a result of police interrogation tactics, particularly when those tactics are deployed against a vulnerable suspect. The leading police interrogation training firm in the country, John E. Reid & Associates – which has been an authority on police interrogations since this Court cited its training manual in the *Miranda* decision fifty years ago – devotes an entire chapter to distinguishing between true and false confessions. Fred Inbau, John Reid, et al., *Criminal Interrogation and Confessions,* (5th ed. 2013), at 340-377.

Rank-and-file officers agree; in a 2007 survey, officers estimated that 10% of all interrogations resulted in a false confession. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices & Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility,* 25 BEHAV. SCI. & L. 757, 770 (2007). Indeed, the well-recognized risk of false confession has recently caused the International Association of Chiefs of Police to partner with *amicus* to create the first-in-the-nation police interrogation protocol geared at mitigating the risk of false confession when interrogating young people. *See* IACP, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation,* at http://www.iacp.org/Portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEff

ectiveJuvenileInterviewandInterrogation.pdf (last visited Jan. 30, 2017).

Similarly, it is well-accepted that multiple false confessions can happen in the same case. In one study, 30% of proven false confession cases involved, more than one defendant who falsely confessed to the same crime. Steven A. Drizin & Richard Leo, *The Problem of False-Confessions in the Post-DNA World,* 82 N.C. L. REV. 891, 972-73 (2004).

In fact, several very high-profile cases involve multiple defendants who were separately interrogated; each ended up giving a confession that appeared to be corroborated by the others' confessions; but all the defendants' confessions were later proven false by DNA. These cases include, but are not limited to:

- The Central Park Five case, in which five New York City youth falsely confessed during police interrogation to a brutal rape and beating of a female jogger, only to be exonerated years later by DNA. *See* Richard Leo, Steven A. Drizin, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty First Century*, 2006 WISC. L. REV. 479, 480-84 (2006).

- Chicago's Dixmoor Five case, in which three Illinois youth falsely confessed during police interrogation to the rape and murder of their fourteen-year-old classmate, only to be exonerated years later by DNA. *See*

Innocence Project, *Background on Dixmoor and Englewood Cases,* at [http://www.innocenceproject.org/background-on-dixmoor-and-englewood-cases/ (last visited Jan. 30, 2017).

- The Norfolk Four case, in which four U.S. Navy sailors falsely confessed during police interrogation to the rape and murder of their fellow seaman's wife, only to be cleared years later through a combination of clemency grants and court decisions, including a federal court decision that concluded that "no sane person" would believe them guilty. *See* Innocence Project, *The Norfolk Four,* at http://www.innocenceproject.org/the-norfolk-four/ (last visited Jan. 30, 2017); Mid-Atlantic Innocence Project, *The Norfolk Four,* at https://exonerate.org/all-project-list/norfolk-four-derek-tice-danial-williams-joseph-dick-and-eric-wilson/ (last visited Jan. 30, 2017).

The interlocking nature of the confessions in these cases, it turned out, was the product of improper police practices like overly suggestive questioning and intentional or inadvertent fact-feeding by detectives – practices that are now specifically proscribed by law enforcement trainers. Brandon L. Garrett, *Contaminated Confessions Revisited,* 2015 Va. L. Rev. 395, 408-15 (2015); Fred Inbau, John Reid, et al., *Criminal Interrogation and Confessions,* at 315, 355 (5th ed. 2013).

False guilty pleas, too, are a well-documented phenomenon in proven wrongful conviction cases. In the body of DNA exoneration cases tracked by the Innocence Project, nearly 10% involved guilty pleas that were later proven false – pleas that were often entered after the defendant had confessed. *See* http://www.innocenceproject.org/innocence-project-guilty-plea-campaign (last visited on Jan. 18, 2017). False confessors are three times more likely to plead guilty than other exonerees. *See* Nat'l Reg. of Exonerations, *Guilty Pleas and False Confessions,* at *http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article4.pdf* (last visited Jan. 30, 2017).

Such false guilty pleas can result from an all-too-rational decision-making process: when charged with a crime that could carry decades in prison, and when the evidence against him appears misleadingly strong (due to a false confession compounded by the failure to disclose exculpatory evidence), even an innocent rational actor could well reason that it is safer to accept a plea deal – and a shorter sentence – than to stand trial and risk the loss of lifelong freedom. Unfortunately, such false guilty pleas are often purchased at the cost of false testimony against one's co-defendants—as in the three examples cited above. For example, in the Dixmoor Five case, two of the defendants pled guilty and testified against their co-defendants in exchange for significantly reduced charges, although DNA testing decades later definitively proved the whole group innocent. *See* Innocence Project, *Background on Dixmoor and Englewood Cases,* at http://www.innocenceproject.org/

background-on-dixmoor-and-englewood-cases/ (last visited Jan. 30, 2017).

Just as the pressures of police interrogation can cause false confessions, common sense suggests that those same pressures can cause young and vulnerable witnesses to provide false information to the police—particularly where, as here, subjects were told that their failure to "cooperate" would be regarded as evidence of complicity in murder. A2198, A2200, A2282-83, A2595.

3. Despite universal agreement that false confessions and false guilty pleas exist, the District of Columbia court proceeded through its materiality analysis as though these miscarriages of justice were nothing more than figments of the imagination. Indeed, the D.C. Court of Appeals found that the exculpatory evidence was not material because "the government presented the testimony of several eyewitnesses, including two participants who admitted their own guilt, who did implicate [petitioners] in a group attack." Pet. App. 49a; *see also id.* at 51a-52a ("to think McMillan could have committed the crime himself, the jury would have to think ... that Alston and Bennett, the government's two cooperating witnesses, were innocent even though they had each pleaded guilty to homicide and continued to admit their guilt").

The D.C. Court of Appeals' faith in confession evidence is simply out-of-date in this post-DNA world. Indeed, the court got it backwards—the need for a robust *Brady* obligation is heightened in cases involving confessions. Prosecutors, in the privacy of

their offices, make the initial—and often fateful—decision of "whether tidbits that could be helpful to the defense are significant enough that a reviewing court will find it to be material, which runs contrary to the philosophy of the *Brady/Giglio* line of cases and increases the risk that highly exculpatory evidence will be suppressed." Hon. Alex Kozinski, *Criminal Law 2.0,* 44 GEO. L. J. ANN. REV. CRIM. PROC. at viii (2015). Prosecutors may believe their cases are very strong when supported by a confession and, thus, that exculpatory evidence is comparatively immaterial:

> Once a suspect confesses, police often close the investigation, deem the case solved, and overlook exculpatory information—even if the confession is internally inconsistent, contradicted by external evidence, or the product of coercive interrogation.

Saul M. Kassin, *Why Confessions Trump Innocence,* 67 AM. PSYCHOL. 431, 437 (2012).

Accordingly, in confession cases, exculpatory evidence in the prosecution's possession will often be underdeveloped and thus appear weaker than it would be after further investigation and refinement by zealous defense counsel.

Something similar happened in this case. The prosecution withheld the report of a witness who claimed to have seen a single attacker, James Blue, pull a woman into the H Street alley on the day that Ms. Fuller was killed. Pet. App. 20a. The prosecution withheld this evidence because he did not

believe the witness and he was "confident in their body of evidence pointing elsewhere." Pet. App. 21a. Thus, based on the prosecution's unilateral decision, defense counsel never had the chance to review and develop these evidentiary leads at the time of trial.

If anything, the government's *Brady* obligations are particularly crucial in cases where the defense argues that a confession is false. One of the most powerful ways of proving that a confession is false is to prove that someone else committed the crime. In many exoneration cases, confessions that were long argued to be false were only accepted as such by the courts after the defendants raised evidence that ultimately led to the identification of the real perpetrator. *See* Innocence Project, *Background on Dixmoor and Englewood Cases,* at http://www.innocenceproject.org/background-on-dixmoor-and-englewood-cases/ (last visited Jan. 30, 2017); Richard Leo, Steven A. Drizin, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty First Century,* 2006 WISC. L. REV. 479, 480-84 (2006).

The lesson of history in the post-DNA world is that false confessions and false guilty pleas happen with "alarming regularity." *See* Hon. Alex Kozinski, *Criminal Law 2.0,* 44 GEO. L. J. ANN. REV. CRIM. PROC. at vii (2015). Judges who ignore this lesson, for example by making it "difficult" to establish that alternative perpetrator evidence is "material" in confession cases (Pet. App. 54a), run the risk of encouraging *Brady* violations and perpetuating wrongful convictions.

II. RISK FACTORS ASSOCIATED WITH FALSE CONFESSIONS ARE PRESENT IN THIS CASE

Leading psychological research, summarized in a peer-reviewed White Paper published by the American Psychological Association, has identified a number of risk factors associated with false confessions. Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations,* 34 LAW & HUM. BEH. 3, 16-3 (2010). There is evidence that many of those risk factors were present in this case.

A. The Confessors Were All Teenagers.

This Court has recognized that youth are at particular risk for false confessions during custodial interrogation. *J.D.B.* at 269; *see also J.D.B.,* 564 U.S. at 289 (Alito, J., dissenting) ("I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult."). Children "generally are less mature and responsible than adults," *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982); they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); and they "are more vulnerable or susceptible to . . . outside pressures" than adults, *Roper v. Simmons*, 543 U.S. 551, 569 (2005). In the specific context of police interrUnited Statesogation, events that "would leave a man cold and unimpressed can overawe and overwhelm a" teen. *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

Indeed, police interrogation trades upon a carefully calibrated system of psychological pressures designed to convince a suspect that the benefits of confessing outweigh the risks – a calculus that children are ill-equipped to make and, under the single-minded and cajoling pressure of interrogation, can too often misjudge. Richard Oshe & Richard Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action,* 74 DENV. U. L. REV. 979, 985-86 (1997).

The result is that juveniles are dramatically overrepresented in studies of proven false confessions. A study of 340 exonerations, for instance, found that individuals under the age of 18 were three times more likely to falsely confess than adults. Samuel R. Gross, et al., *Exonerations in the United States, 1989 through 2003,* 95 J. CRIM. L. & CRIMINOLOGY 523, 553 (2005); *see also* Brandon L. Garrett, *Contaminated Confessions Revisited,* 2015 VA. L. REV. 395, 400 (2015) (juveniles account for one-third of known false confessions). The International Association of Chiefs of Police, too, has recognized that "false confessions are a leading cause of wrongful convictions of youth." IACP, Reducing Risks: An Executive Guide to Effective Juvenile Interview and Interrogation (2012), p. 1, http://www.iacp.org/Portals/0/pdfs/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf (last visited Jan. 18, 2017). It agrees that "juveniles are particularly likely to give false information—and even falsely confess—when questioned by law enforcement." *Id.*

This is a case built entirely on statements obtained from young people – secured after police interrogation. Most notably, Petitioner Yarborough was 16 when he was interrogated and eventually confessed to participating in the attack. A1178.[3] His youthful vulnerabilities, moreover, were compounded by the fact that he is intellectually disabled, another significant risk factor that is associated with false confessions. *See* Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations,* 34 LAW & HUM. BEH. 3, 19-21 (2010); *Atkins v. Virginia,* 536 U.S. 304, 321 n.25 (2002) (identifying intellectual disability as a risk factor for false confessions). And while *J.D.B.* and other cases have drawn a line at age 18 for purposes of *Miranda* custody rules and other pragmatic legal schemes, the psychological literature establishes that youthful vulnerabilities do not suddenly vanish upon one's eighteenth birthInday. *See* e.g. Elizabeth R. Sowell et al., *In Vivo Evidence For Post-Adolescent Brain Maturation In Frontal And Striatal Regions,* 2 NATURE NEUROSCIENCE 10 (1999) (finding that the frontal lobe does not mature until the early 20s and undergoes far more change during adolescence than any other stage of life). In a study of 125 proven false confessions, 31% of the false confessors were between the ages of 18 and 25. Steven A. Drizin & Richard Leo, the *Problem of False Confessions in the Post-DNA World,* 82 N.C. L. REV. at 945. Therefore, Alston and Bennett's relative youth – Alston was 19 when he was interrogated, and Bennett was 18 –creates a

---

[3] "A" citations refer to the Appendix in the D.C. Court of Appeals.

significant risk for false confession. A1176, A1174, JX83.[4]

B. There Is Evidence that Threats of Harm and Other Coercive Tactics were Used During These Interrogations.

Despite the suspects' youthfulness, the police appear to have conducted their interrogations in an extremely aggressive fashion that evoked a risk of physical harm. The police got in the faces of these young people, screamed at them, and pounded the table when they refused to confess. Pet. App. 15a, n. 11; The police used good cop/bad cop tactics, which included the "bad cop" flying into a theatrical rage so severe that the "good cop" had to lock him out of the interrogation room before he lost all control – whereupon the "bad cop" pounded on the door in a fury and demanded to be let back in. A2539-40, A2563-64, A2469-70. In one case, the officer tore his shirt off (or pretended to do so) to exhibit his uncontainable anger when the suspect would not confess. Pet. App. 68a, A2593. The officers admitted to trying to "intimidat[e]" and "scare" Yarborough, an intellectually disabled juvenile, with these tactics. A2541, A2564. They focused on him because he was the "weakest" and "most likely to crack from pressure." A13998. The "bad cop" admitted that these tactics were designed to demonstrate to Yarborough that "*he would be better off if he told [the police] what he thought [they] wanted to hear.*" A2538 (emphasis added).

---

[4] "JX" citations refer to exhibits from the post-conviction proceedings in the Superior Court.

Deployed as they were against young people alone in an interrogation room, such tactics risk implying that continued protestations of innocence could result in violence – a message that could easily result in false confessions. *See Brown v. Mississippi*, 297 U.S. 278 (1936); Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations*, 34 LAW & HUM. BEH. 3-38 (2010).

On top of these theatrical displays of rage, the police admitted telling Alston and Bennett that they would face harsher punishment unless they said that they were involved and fingered others. Pet. App. 15a, n.11; A2518. The officers wanted Alston and Bennett to believe that they would receive leniency if they "cooperated." A2518-20. Alston and Bennett reported that the officers threatened them with life sentences if they refused to admit their participation. Pet. App. 12a-15a; A6524-26. According to Alston, the officers said that the sentence in the case was like a pie, where he could have the whole pie (a life sentence) or a slice (a much shorter sentence). A6524-26. While the police denied threatening life sentences explicitly, they admitted using the pie analogy and it was certainly implicit that the "whole pie" in a brutal murder case would be a very long sentence indeed. A2576-77, A2566, A13958.

These types of threats and inducements present an increased risk of generating false confessions. Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations*, 34 LAW & HUM. BEH. 3, 12 (2010). Experience has proven that impressionable young men can believe the police assessment that a

conviction is certain (even if wrongful), and then try to make the best of a bad situation by falsely confessing. Saul Kassin, Steven A. Drizin, et al., *Police-Induced Confessions: Risk Factors & Recommendations,* 34 LAW & HUM. BEH. 3, 18-19 (2010).

C. The Confessions Were Inconsistent with the Crime Scene Evidence

1. Each of the alleged confessors described the crime in a way that was inconsistent with the crime scene evidence, as well as with the details of each other's confessions. This is a clear red flag of a false confession. In a recent study of false confession cases, the vast majority of exonerees made statements that were contradicted by crime scene evidence. Brandon L. Garrett, *The Substance of False Confessions,* 62 STAN. L. REV. 1051, 1087 (2010).

For example, knowing that the police believed that Ms. Fuller's murder was a group attack, the young men all described a frenzied assault. But the details that they provided often contradicted each other and, most importantly, the crime scene evidence. Bennett and Alston "each had made prior inconsistent statements to the police and the grand jury regarding who was present in the park and who participated in attacking Fuller." Pet. App. 6a. As to Mr. Yarborough, the decision below acknowledged: "many of the things Yarborough said on the videotape [his confession] seem unlikely when compared to the other evidence." Pet. App. 70a.

Yarborough described Ms. Fuller's blouse being torn off during the attack, but she was not wearing a blouse, she was wearing a sweater, which was intact and still on her body when it was found. A1033, A1035, A2207, A2238-39. Alston and Bennett described her being punched and kicked by multiple assailants, but her injuries were localized to one side of her body, which is inconsistent with a large group attack. A1086, A1149, A2134, A2141-45.

Alston claimed that someone hit Ms. Fuller with a 2X4 in the back of her head. A480, A1154-1156. Yarborough claimed that she was hit in the head with a stick. A1032-33, A1035. However, Ms. Fuller had no injury to the back of her head and no lacerations, soft-tissue trauma, bleeding, or other injury consistent with such a blow. A2134, A2146, A2149-50.

Bennett testified that someone punched Ms. Fuller so hard in the chin that she lost consciousness, but Ms. Fuller had no injuries consistent with such a blow—she had no injuries to her chin or jaw, no bruising on her lips, and no sign of trauma in her oral cavity. A1872, A2134, A2146-48.

Bennett "confessed" in the interrogation room that two individuals separately sodomized Ms. Fuller. A1093. However, the medical evidence showed that Ms. Fuller's was sodomized by a single thrust. A2136-37. By the time of trial, Bennett's testimony had evolved, consistent with the other witnesses, that one person sodomized her. A1093, A1117, A411.

2. Moreover, many government witnesses claimed that Ms. Fuller's legs were held down during the assault, but there were no restraint marks on her legs. A410-11, A497-98, A553-54, A1156, A2240-41.

These details seem more like an effort to placate the pre-conceived beliefs of the police than an accurate description of an event that they actually witnessed. See *Miranda v. Arizona*, 384 U.S. 436, 455 (1966) (describing tactics which pressure a suspect to "merely confirm[ ] the pre-conceived story the police seek to have him describe").

The witnesses got many other details wrong as well. Bennett stated that the attack occurred on a sunny day, when in fact it was raining. A1078, A1721. Many witnesses placed the attack in the wrong location: Alston drew a diagram that put the attack in the wrong corner of the garage and Yarborough said it happened out in the alley. A2533, A2503, A1671, A1187, A1033.

Maurice Thomas was in eighth grade when he told police he witnessed (but did not participate in) the assault. However, when he first described what he saw, he put himself in a position where he could not possibly have seen the crime. A1929, A1943-44, A1212, A1232, A1236. Only after further questioning by the police did his story evolve until he was able to testify at trial that he was finally in the only spot where a person could have seen the crime. A626-41.

These inconsistencies provide further support that these confessions and statements may have been false.

D. The Confessions Were Contaminated

One way of testing the reliability of confessions is to determine whether the confessor was able, without prompting from police, to describe crime scene details that only the real perpetrator would know. However, just like biological evidence, confessions can easily be contaminated. Contamination occurs when the police feed facts to the suspect and the suspect merely parrots back those facts, resulting in a confession that appears far more reliable than it really is. Contamination is overwhelmingly present in proven false confession cases. Brandon L. Garrett, *Contaminated Confessions Revisited,* 2015 VA. L. REV. 395, 408 (2015).

In this case, there is evidence that the confessions were heavily contaminated. The detectives admitted asking leading questions—questions that suggest the desired answer—during the interrogation. A13951. They also confronted witnesses with the substance of statements made by others, albeit while avoiding identifying the other witnesses by name. A2564-65, A2568-70, A2427, A1001, A13952-55. The predictable result was that the witnesses began to tell similar stories.

For example, Petitioner Yarborough—the intellectually disabled 16-year-old—gave his statement after hours of intentionally intimidating and coercive interrogation. A2040, A2541, A2564. The only record of his interrogation was a set of written questions and answers, which indicates that Yarborough was provided names by the detectives

whom he then said participated in the crime. A1178, 1180, A2493-2501.

Alston's confession came after hours of police interrogation, involving raised voices, slamming hands on desks, and pointing fingers. A2517. According to the detective's notes, he initially denied any knowledge. A2517, A1665-66. After he eventually agreed to acting as a lookout (A1666-69), the detectives went over a series of names with him, many of which Alston had never previously reported. A1670. Alston did not identify anyone at the scene who was not first identified by the police. A1670; A2528-2530.

There is no indication that the detectives questioned Bennett any differently, raising the risk that his confession was contaminated by facts included in leading questions. In addition, his confessions appeared to have been contaminated by news stories. In his videotaped confession, he stated that he had seen news stories of the arrests of at least some of the Petitioners. A1080. He stated that the people he had seen being arrested on the news were present when the attack started. A1080-81.[5] He testified that he thought if he repeated back what he heard in the news, the police would "leave him alone some." A2117.

Bennett states the contamination went even, further—though these details were contested by the detectives. Bennett claims that the police left their

---

[5] He even described what one of the Petitioners was wearing when he was arrested. A1080.

investigation files in the interrogation room and that Bennett read these files whenever the police left so he could better accord his statement with what they wanted to hear. A2124-2125. In his videotaped confessions, there are more files on the table in front of Bennett than are seen in the confessions of Alston and Yarborough. A2917, A2914, A2916. He also claimed that Yarborough's videotaped confession was played to him, perhaps accidentally. A2125, Pet. App. 13a. All of these sources would have given Bennett the ability to tailor his statement to better match the detective's pre-conceived group attack theory.

E. The Confessions Were Too Unreliable and the Prosecution Case Too Weak to Excuse Compliance with *Brady*.

Given these risk factors, these confessions were particularly subject to challenge. The defense would have had fertile ground to argue that the confessions were untruthful, particularly when backed by strong evidence that someone else committed the crime. Indeed, even without that evidence, the jury deliberated for seven days before acquitting two defendants and deadlocking on two others. Pet. App. 10a-11a. Even the prosecutor acknowledged that the case was a close one that could have easily gone the other way. A1734, A1751.

This Court has recognized that the materiality standard is less strict where, as here, the prosecution evidence is weak. *United States v. Agurs*, 427 U.S. 97, 113 (1976). The D.C. Court of Appeals' failure to grapple with the very real possibility that the

confessions were false undermined its materiality analysis.

CONCLUSION

There is nothing special about confession evidence that makes it infallible. To the contrary, confessions and statements obtained in the course of interrogations, particularly those that present the risk factors of false confessions listed above, must be viewed not as certain guarantors of guilt, but as evidence particularly susceptible to error – and certainly susceptible to challenge by a defense attorney armed with all the information bearing on the statements' credibility. Indeed, the statements in this case bear many markers of unreliability and thus present a classic example of why the robustness of the *Brady* rule must be preserved in confession cases. The Center thus asks this Court to reverse the judgment of the District of Columbia Court of Appeals.

Respectfully submitted,

Laura H. Nirider
Counsel of Record
Steven A. Drizin
Megan G. Crane
CENTER ON
WRONGFUL
CONVICTIONS OF
YOUTH

Robert Humphreys
AKIN GUMP STRAUSS
HAUER & FELD LLP

February 3, 2017